

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

7 RANDY RICH, as personal) 2:09-cv-02450-ECR-RJJ
representative of RYAN RICH,)
8 deceased, and NICK JENSEN and)
TANYA JENSEN as guardians for)
9 R.J., a minor,)
10 Plaintiffs,)
11 vs.)
12 TASER INTERNATIONAL, INC., and)
DOES 1 to 10, inclusive,)
13 Defendants.)
14)

This case arises out of allegations that an Electronic Control
17 Device produced by Defendant TASER International, Inc. ("TASER")
18 caused the death of Dr. Ryan Rich. Now pending before the Court is
19 Defendant TASER's Motion for Sanctions (#111). The motion is ripe and
20 we now rule on it.

I. Factual Background

On January 4, 2008, decedent Dr. Ryan Rich ("Dr. Rich"), who had a history of seizure disorders, was driving on Interstate-15 in Las Vegas, Nevada when he had a seizure which resulted in several minor traffic collisions, witnessed by Nevada Highway Patrol Officer Loren Lazoff ("Officer Lazoff"). (Compl. ¶¶ 11-13.) After the accident,

1 Officer Lazoff approached the vehicle and a struggle ensued, as Dr.
2 Lazoff was in a dazed post-seizure state. (*Id.* ¶¶ 13-15.) When Dr.
3 Rich eluded Officer Lazoff's grasp and began heading toward oncoming
4 traffic, Officer Lazoff found it necessary to discharge his TASER
5 Model X26 Electronic Control Device (the "ECD") three times into Dr.
6 Rich's chest from a distance of about three to four feet, and then two
7 additional times to Dr. Rich's right thigh before he was able to
8 handcuff Dr. Rich with the help of a passerby. (*Id.* ¶¶ 16-18.) When
9 Officer Lazoff returned to his patrol vehicle to call an ambulance,
10 the passerby informed him the Dr. Rich was turning blue. (*Id.* ¶ 20.)
11 Paramedics transported Dr. Rich to Spring Valley Hospital where he was
12 pronounced dead. (*Id.* ¶ 21.)

II. Procedural Background

15 Plaintiffs filed the Complaint (#1) on December 30, 2009,
16 alleging the following five causes of action: (1) Negligence; (2)
17 Strict Product Liability; (3) Intentional Misrepresentation; (4)
18 Fraudulent Concealment and Deceit; and (5) Negligent
19 Misrepresentation. TASER filed its answer (#13) on April 26, 2010.

20 On July 2, 2011, TASER filed three Motions in Limine (## 50, 51,
21 52), seeking to exclude the testimony of Dr. Jerome Engel, Dr. Michael
22 Wogalter, and Dr. Douglas Zipes, respectively, and a Motion for
23 Summary Judgment (#53).

24 On January 25, 2012, TASER filed a Motion for Sanctions (#111)
25 pursuant to Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927
26 for failure to voluntarily dismiss the case. Plaintiffs filed their

1 Response (#114), which also requests Rule 11 sanctions against TASER,
 2 on February 13, 2012. TASER replied (#116) on February 23, 2012.

3 On March 30, 2012, we issued an Order (#119) granting TASER's
 4 Motions in Limine (## 50, 51) to exclude the testimony of Drs. Jerome
 5 Engel and Michael Wogalter, respectively, and denying TASER's Motion
 6 in Limine (#52) to exclude the testimony of Dr. Douglas Zipes.
 7 Further, we granted TASER's Motion for Summary Judgment (#53) with
 8 regard to Plaintiffs' third, fourth, and fifth causes of action, and
 9 denied the motion as to Plaintiffs' first and second causes of action
 10 for negligence and strict product liability. We further granted
 11 TASER's Motion to Strike (#109) and struck Dr. Zipes' supplemental
 12 report (#108-1) from the record.

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14 **III. Legal Standard**

15 **A. Rule 11 Sanctions**

16 Federal Rule of Civil Procedure 11(b) provides that by presenting
 17 or submitting any filing to the court,

18 an attorney . . . certifies that to the best of the person's
 19 knowledge, information, and belief, formed after an inquiry
 reasonable under the circumstances:

- 20 (1) it is not being presented for any improper purpose,
 such as to harass, cause unnecessary delay, or
 needlessly increase the cost of litigation;
- 21 (2) the claims, defenses, and other legal contentions are
 warranted by existing law or by a nonfrivolous argument
 for extending, modifying, or reversing existing law or
 for establishing new law;
- 22 (3) the factual contentions have evidentiary support or, if
 specifically so identified, will likely have
 evidentiary support after a reasonable opportunity for
 further investigation or discovery; . . .

23 For violations of Rule 11(b), Rule 11(c) further provides that "[a]
 24 motion for sanctions must be made separately from any other motion and
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1 must describe the specific conduct that allegedly violates Rule
2 11(b)." FED. R. CIV. P. 11(c)(2). Rule 11(c)(2) further authorizes the
3 court to award the prevailing party reasonable expenses, including
4 attorney's fees, incurred for the motion. Id. Rule 11 imposes an
5 objective test. Zaldivar v. City of Los Angeles, 780 F.2d 823, 831
6 (9th Cir. 1986).

7 Under this objective standard, "improper purpose" as set forth in
8 11(b)(1) may be deduced where there is no legal or factual basis for
9 a claim. See Huetting & Schromm, Inc. v. Landscape Contractors, 790
10 F.2d 1421, 1427 (9th Cir. 1986). For purposes of Rule 11(b)(2), a
11 cause of action is not warranted by law where no "plausible, good
12 faith argument can be made by a competent attorney" in support of the
13 proposition asserted. Zaldivar, 780 F.2d at 829. Finally, under Rule
14 11(b)(3), a cause of action is grounded in fact if an independent
15 examination reveals "some credible evidence" in support of a party's
16 statements. Himaka v. Buddhist Churches of Am, 917 F.Supp. 698, 710
17 (N.D.Cal. 1995) (quoting Kendrick v. Zanides, 609 F.Supp. 1162, 1172
18 (N.D.Cal. 1985)). The terms of Rule 11 are mandatory: where the
19 certification required by Rule 11 has been violated, sanctions must be
20 imposed. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d
21 1531, 1536, 1540 (9th Cir. 1986). The type and amount of sanction,
22 however, remain within the discretion of the Court. Id. Rule 11 does
23 not inhibit the Court from imposing sanctions, awarding expenses, or
24 directing remedial action authorized under other rules or under 28
25 U.S.C. § 1927. See Chambers v. NASCO, 501 U.S. 32, 48-49 (1991).

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1 **B. Section 1927 Sanctions**

2 Title 28 U.S.C. § 1927 provides that an attorney in federal court
 3 "who so multiplies the proceedings in any case unreasonably and
 4 vexatiously may be required by the court to satisfy personally the
 5 excess costs, expenses, and attorneys' fees reasonably incurred
 6 because of such conduct." This section is "concerned only with
 7 limited the abuse of court processes" and is "indifferent to the
 8 equities of a dispute and to the values advanced by the substantive
 9 law." Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980).
 10 Under prevailing Ninth Circuit law, a court must find that an attorney
 11 acted "recklessly or in bad faith" before imposing costs and fees
 12 under § 1927. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,
 13 809 F.2d 626, 638 (9th Cir. 1987). Frivolity does not of itself
 14 establish bad faith. Id. Finally, "[n]otice and a hearing should
 15 precede imposition of a sanction under § 1927." Id.

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17 **IV. Discussion**

18 **A. Defendant TASER's Motion for Sanctions (#111)**

19 Defendant TASER argues that Plaintiffs have failed to produce
 20 evidence that establishes that TASER failed to provide adequate
 21 warnings or that the TASER X26 ECD caused Dr. Rich's death and should
 22 therefore be sanctioned for failing to dismiss the case voluntarily.
 23 TASER's arguments are completely without merit and simply restate the
 24 arguments made in TASER's motion for summary judgment (#53). In our
 25 March 30, 2012 order (#119) denying TASER's motion for summary
 26 judgment with regard to Plaintiffs' negligence and strict liability

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1 claims, we found that Plaintiffs produced evidence sufficient to
2 establish a genuine issue of material fact as to whether the TASER's
3 X26 ECD device caused Dr. Rich's cardiac arrest and whether TASER's
4 failure to warn users against the danger of deploying the device at a
5 target's chest area caused Dr. Rich's death. In that order (#119), we
6 specifically relied upon Officer Lazoff's testimony that he was
7 instructed to fire the ECD at the chest area and that he was not made
8 aware of any known cardiac risks associated with the used of the ECD.
9 (See Order (#119) at 18.) We also relied upon the testimony of
10 Plaintiffs' expert witness, Dr. Douglas Zipes, as evidence that
11 repeated discharges of an ECD into a target's chest can cause
12 ventricular fibrillation and asystole. (Id. at 20.) For these
13 reasons, TASER's request for sanctions pursuant to Federal Rule of
14 Civil Procedure 11 and 28 U.S.C. § 1927 based upon Plaintiffs' failure
15 to voluntarily dismiss the case must be denied.

16 Moreover, Rule 11(c)(2) authorizes the court to award the
17 prevailing party reasonable expenses, including attorney's fees,
18 incurred for the motion "[i]f warranted." The Court finds that an
19 award to Plaintiffs, to be borne by counsel for Defendant TASER, of
20 the reasonable expenses, including attorney's fees, incurred in
21 defending against Defendant TASER's motion is in fact warranted in
22 this case. As Plaintiffs point out, the Advisory Committee Notes to
23 the 1993 Amendments to Rule 11 provide, in relevant part, as follows:

24 [Rule 11 motions] should be not be employed . . to test the
25 legal sufficiency or efficacy of allegations in the
pleadings; other motions are available for those purposes.
Nor should Rule 11 motions be prepared to emphasize the
26 merits of a party's position, . . to intimidate an adversary

1 into withdrawing contentions that are fairly debatable, [or]
 2 to increase the costs of litigation, . . .

3 FED. R. CIV. P. 11 1993 Amendments advisory committee's note. See also
 4 Gaiardo v. Ethyl Corp., 835 F.2d 479, 485 ("The use of Rule 11 as an
 5 additional tactic of intimidation and harassment has become part of
 6 the so-called 'hardball' litigation techniques espoused by some firms
 7 and their clients. Those practitioners are cautioned that they invite
 8 retribution from courts which are far from enchanted with such abusive
 9 conduct. A court may impose sanctions on its own initiative when the
 10 Rule is invoked for an improper purpose.") (footnote and citation
 11 omitted). TASER's Motion for Sanctions (#111) is composed almost
 12 entirely of arguments that Plaintiffs have not produced evidence of
 13 essential elements of their claims - arguments that have already been
 14 made in TASER's Motion for Summary Judgment (#53) and Motion in Limine
 15 (#52) to exclude the testimony of Dr. Douglas Zipes. TASER even
 16 includes the testimony of its own expert, Dr. Mark Kroll, Ph.D., to
 17 refute Dr. Zipes' testimony. A Rule 11 motion is not a proper vehicle
 18 for arguing the merits of a case or refuting the testimony of an
 19 expert witness - "other motions are available for those purposes."
 20 FED. R. CIV. P. 11 advisory committee's note. TASER's Motion for
 21 Sanctions (#111) is completely without merit and quite probably, in
 22 this Court's estimation, brought for an improper purpose. Plaintiffs
 23 will therefore be awarded the reasonable expenses of defending such a
 24 motion pursuant to Federal Rule of Civil Procedure 11(c)(2).

25 Moreover, TASER is not entitled to sanctions pursuant to 28
 26 U.S.C. § 1927. Plaintiffs did not vexatiously multiply the
 27 proceedings by refusing to withdraw their complaint in the face of

1 TASER's threat to move for sanctions. A complaint that survives a
2 motion for summary judgment is not an "unnecessary filing[]" subject
3 to the sanction of section 1927. In re Keegan Mgmt. Co. Sec. Litig.,
4 78 F.3d 431, 435 (9th Cir. 1996); see also Handte v. Wells Fargo Bank
5 N.A., No. 3:11-cv-00900-ECR-VPC, 2012 WL 2921493, at *5 (D. Nev. Jul.
6 16, 2012) (holding that section 1927 sanctions cannot be applied to
7 the filing of a complaint). And while we seriously question the
8 conduct of counsel for Defendant TASER, we cannot say that Plaintiffs'
9 attorneys acted "recklessly or in bad faith" in refusing to withdraw
10 their meritorious case, as is required by the Ninth Circuit before
11 imposing sanctions. See T.W. Elec. Serv., Inc., 809 F.2d at 638.
12 Moreover, section 1927 sanctions cannot be applied to an initial
13 pleading, but rather "only to unnecessary filings and tactics once a
14 lawsuit has begun." In re Keegan Mgmt., 78 F.3d at 435 (citations
15 omitted). TASER's motion for section 1927 sanctions therefore fails
16 on its face and must be denied.

17 **B. Plaintiffs' Motion for Sanctions (#114)**

18 While we award to Plaintiffs the cost of defending against
19 TASER's Motion for Sanctions (#111), it appears that Plaintiffs also
20 request additional Rule 11 sanctions in their Response (#114).
21 Plaintiffs' motion is unnecessary if Plaintiffs merely seek recompense
22 for the cost of defending against TASER's baseless Rule 11 motion.
23 See FED. R. CIV. P. 11 1993 Amendments advisory committee's note ("[T]he
24 filing of a motion for sanctions is itself subject to the requirements
25 of the rule and can lead to sanctions. However, service of a cross
26 motion under Rule 11 should rarely be needed since under the revision

1 the court may award to the person who prevails on a motion under Rule
2 11 - whether the movant or the target of the motion - reasonable
3 expenses, including attorney's fees, incurred in presenting or
4 opposing the motion."). To the extent that Plaintiffs seek additional
5 sanctions, Plaintiffs' request must be denied as procedurally
6 improper. Rule 11(c) (2) proves that "[a] motion for sanctions must be
7 made separately from any other motion. . . ." Further, Plaintiffs did
8 not serve notice of the intent to seek sanctions twenty-one days prior
9 to filing the request, as is also required by Rule 11(c) (2). For this
10 reason, Plaintiffs' request for additional Rule 11 sanctions against
11 TASER must be denied.

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13 **V. Conclusion**

14 Defendant TASER moved for sanctions on the grounds that
15 Plaintiffs should have voluntarily dismissed their case because they
16 have no evidence of causation. Plaintiffs presented evidence of
17 causation, however, sufficient to survive a motion for summary
18 judgment. As such, TASER's argument for sanction are without merit,
19 and we find that it was brought for the improper purpose of
20 emphasizing the merits of TASER's case. As such, we find that an
21 award to Plaintiffs of the costs of defending against TASER's motion
22 is warranted in this case. However, to the extent that Plaintiffs
23 seek additional sanction, Plaintiffs' request must be denied as
24 procedurally improper.

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1 **IT IS, THEREFORE, HEREBY ORDERED** that Defendant TASER
2 International, Inc.'s Motion for Sanctions (#111) is **DENIED**.
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4 **IT IS FURTHER ORDERED** that Plaintiffs shall have fourteen (14)
5 days within which to file an Application for Costs and Fees incurred
6 for TASER's Motion for Sanctions (#111).
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8 **IT IS FURTHER ORDERED** that Plaintiffs' Motion for Sanctions
9 (#114) is **DENIED**.
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13 DATED: August 2, 2012.

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15 UNITED STATES DISTRICT JUDGE
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